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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ANGEL C. et al., Persons Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

LARRY C. et al.,

Defendants and Appellants.

D038044

(Super. Ct. Nos. J509313E-F)

APPEALS from judgments of the Superior Court of San Diego County, Elizabeth
A. Riggs, Judge. Affirmed.

Larry C. (Father) and Becky W. (Mother) appeal judgments terminating their
parental rights to their children Angel C. and Larry C. Father contends the judgment is
void because notice of the custody proceedings was not provided as required under the
Indian Child Welfare Act (ICWA) and the court erred in terminating his parental rights
because substantial evidence does not support a finding there is no beneficial relationship

between him and the children. Mother contends the court prejudicially erred in not notifying her that under Welfare and Institutions Code¹ section 366.26, subdivision (1)(3)(A), she must challenge the order referring the matter for a hearing under section 366.26 by a petition for an extraordinary writ, it reversibly erred in finding no beneficial parent-child relationship, and it abused its discretion when it misapplied the law in terminating parental rights. Each parent also adopts and joins in the contentions of the other parent and argues if the judgments are reversed regarding the other parent, the judgments terminating his or her own rights also must be reversed. We affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

Angel was born to Mother and Father in September 1998. Mother's four older children had been removed from her custody in 1993 and are in adoptive homes. Mother met Father in 1998. He earlier had two children with Christine L., who became pregnant with their first child, Misty C., when she was 13, and with their second child, James C., the next year. After Christine and Father separated, he was the primary caretaker of Misty and James.

In October 1998 the San Diego County Health and Human Services Agency (Agency) filed petitions on behalf of Misty and James alleging Father had sexually abused them and the family's housing was inadequate. At the time, Mother was staying at her mother's house. She has a history of abusing drugs, but told the social worker she

¹ All statutory references are to the Welfare and Institutions Code.

had been sober since October 1997. Father said his mother was from a Cherokee tribe in Colorado, but had no enrollment number. His sister, Jenny B., denied she and Father have any Native American heritage. Teachers from Misty and James's school said the children had bad hygiene, wore dirty clothes and performed poorly academically. The teachers said the parents also smelled bad and Angel always wore the same clothing.

That month, Agency took Angel into protective custody and petitioned under section 300, subdivision (b), alleging Mother abused drugs, the parents' home was filthy, unsanitary and unsafe, and Mother had failed to reunify with her older children, who had been removed because of severe physical harm and her failure to protect them from sexual abuse. The petition also alleged under section 300, subdivision (j), that Angel was at risk based on Father's abuse of Misty. The court found a prima facie showing had been made under section 300, subdivisions (b) and (j), and detained Angel.

At the November 10, 1998 jurisdictional hearing, the parents submitted to the allegations of the petition and the court found them true. At the dispositional hearing, it declared Angel a dependent child, removed her from the parents' custody and placed her in foster care. The court granted Mother unsupervised visits and gave Agency discretion to lift supervision for Father's visits with concurrence of Angel's counsel.

In a March 4, 1999 report, the social worker noted there had been 21 referrals alleging sexual molestation, neglect and physical abuse by Father. James told the social worker Father had fondled him over his clothes two years before and had threatened to kill him if he told anyone. Other relatives told of numerous past incidents of Father

sexually abusing children. Agency filed a subsequent petition under section 300, subdivision (j), alleging Angel was at risk because of Father's sexual abuse of James.

The psychologist who evaluated Father concluded he presents a risk of sexual abuse to children. A psychologist who evaluated Mother opined she has a dependent personality disorder and functions in a borderline range of intelligence. She recommended Mother demonstrate she has sufficient skills and independence to allow her to live apart from Father or another mate before reunification with Angel.

At the six-month review hearing on May 12, 1999, the court found returning Angel to the parents' custody would create a substantial risk. It continued her in foster care and granted the social worker discretion to allow a 60-day trial visit with Mother, with concurrence of Angel's counsel.

For the 12-month hearing, the social worker reported the parents had completed two cycles of Safe Paths, but could not go on to the next cycle because Father denied the molestations and Mother violated confidentiality guidelines. The parents visited Angel each week and Mother had an unsupervised weekend visit. At the 12-month hearing on November 22, 1999, the court found returning Angel to the parents' custody would create a substantial risk, found Mother had made good progress and gave Agency discretion to allow a 60-day trial visit with Mother.

For the 18-month hearing, the social worker reported Angel's foster family would adopt her if she were freed for adoption. Her developmental evaluation showed she had significant delays.

In May 2000 Mother gave birth to Larry. She testified at two hearings she did not know Larry's whereabouts, but indicated he was with her sister in Colorado, giving an invalid address for the sister. The court ordered Agency to investigate.

At the 18-month permanency planning hearing for Angel on June 5, 2000, the court found returning her to the parents' custody would create a substantial risk. It found reasonable services had been provided or offered, continued Angel in foster care and ordered visits to remain supervised. It terminated reunification services and set the matter for a hearing under section 366.26. On June 7, Agency petitioned on Larry's behalf under section 300, subdivision (j), based on Father's sexual abuse of Misty and James. The court found a prima facie showing had been made and ordered Larry detained when found. Agency stopped visits between Angel and the parents because they had not surrendered Larry and the social worker believed they might flee with Angel.

On July 21, 2000, Larry was taken into protective custody when Father was stopped for traffic infractions. Mother and Larry were in the car and she and Father provided inconsistent stories to the officer. Mother denied having a relationship with Father. The social worker recommended no reunification services because of the parents' conflicting stories about their relationship, their hiding of Larry, and their past failures to reunify with their other children. At the August 31 jurisdictional hearing for Larry, the parents submitted to the allegations of the petition and the court found them to be true. On October 4, the court declared Larry a dependent child, placed him in foster care, denied reunification services and set the matter for a hearing under section 366.26.

At the section 366.26 hearing the court considered various documents, including a bonding study that found no significant bond between Mother and Angel. The social worker's reports detailed the parents' history of successful visits with Angel, their lack of truthfulness to authorities, their failures to reunify with other children, and Father's denials he had sexually abused children in the past and Mother's belief in his denials. The social worker noted Angel's developmental delays, and opined Angel was adoptable and it would not be detrimental to her to terminate parental rights. She reported Larry enjoyed visits with his parents, but contact with them would not outweigh the benefits of the stability of an adoptive home. She opined Larry was adoptable and recommended termination of parental rights and a permanent plan of adoption. In a later report, the social worker noted the children reacted adversely after visits with the parents.

The social worker testified that according to her assessment, Angel and Larry are very adoptable. They are in the same foster home, where the foster parents have indicated they are interested in adopting both of them. In addition, at least 50 adoptive homes are interested in adopting children like Angel and Larry and 30 are available to adopt them together. She characterized the parents' relationships with the children as that of friendly visitors and opined the children would not benefit from continuing the relationships.

Mother testified about the affection the children showed toward her and said Angel calls her mommy and Larry once called her mommy. She testified she had a once-a-week job and thought she could provide for the children.

Father testified he and Mother do not live together, but see each other each week for three hours when she does paper work for him and they also saw each other during joint visits. He said Angel and Larry are upset when visits end. He testified he does not believe he presents a danger to the children, and denied molesting Misty and James, but said he was willing to move away if Mother could reunify.

The psychologist who completed the bonding study testified to his opinion that there is no significant parent-child relationship between Mother and Angel because Mother had not cared for Angel during critical periods in her life.

The court found by clear and convincing evidence it was likely the children would be adopted if parental rights were terminated. It found none of the circumstances of section 366.26, subdivision (c)(1) were present that would make termination detrimental to the children. It terminated parental rights and referred Angel and Larry for adoptive placement.

DISCUSSION

I. Lack of Notice under the ICWA

Father contends the judgments are void because the court did not require Agency to provide notice of the custody proceedings as required by the ICWA. He argues this error is jurisdictional because the social worker did not investigate the possibility that Angel and Larry could be Indian children and did not notify the Cherokee tribes.

Father, however, did not object at any hearing to the failure to provide notice under the ICWA. He told the social worker his grandmother was from the Cherokee tribe, but he was present and did not object at the detention hearing for Angel when his

counsel said she did not believe there was any Native American heritage. He also did not object at the dispositional hearings when the ICWA was not applied, nor raise the issue at the hearing under section 366.26.

Even were the issue not waived, however, the court was not obligated to provide notice under the ICWA. A major purpose of the ICWA is to protect "Indian children who are members of or are eligible for membership in an Indian tribe." (25 U.S.C. § 1901(3).) Under the ICWA "'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).)

Cases on which Father relies for his argument notification is required when there is any indication of Native American heritage do not support his cause. In each of those cases, there was strong evidence the child involved in the proceeding was an Indian child under the definition of United States Code section 1903(4). (*In re Junious M.* (1983) 144 Cal.App.3d 786, 791 [the child's mother testified she grew up on the Nooksack reservation and the child could register to become a member]; *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1420 [it was conceded the child would likely be determined to be a member of the tribe]; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 465 [the child's grandmother was a member of a recognized tribe and requested the child be placed with her]; *Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404, 406 [the biological father was an enrolled member of the Little Lake Tribe].) Here, although Father mentioned his grandmother was from a Cherokee tribe, his sister, who has the same parents, said there was no Native American heritage, and his attorney told the court she believed there was

no Native American heritage. There was no basis for the court to believe that Angel and Larry were Indian children for purposes of the ICWA or to require notice under the ICWA.

II. Lack of Proper Notice to Mother of her Obligation to Challenge the Referral Order by a Petition for an Extraordinary Writ

Mother contends she was denied due process because the court did not notify her of her obligation under section 366.26, subdivision (1)(3)(A), to challenge the referral order for Larry by a petition for an extraordinary writ. Mother is correct the court did not expressly notify her at the dispositional hearing that she must petition for an extraordinary writ, but instead asked Mother's counsel if she had informed Mother of her right to appeal.² Mother, however, was provided with adequate notice. The record shows the court clerk sent Mother a copy of the minute order. The minute order indicates writ review is required. Also, the words "writ resent" are handwritten on the page where it indicates the court clerk sent a copy of the minute order to Mother. Further, Mother was expressly advised of the need for writ review in Angel's case only a few months earlier on June 5, 2000 and had been mailed a copy of that minute order. Notice was adequate.

Moreover, Mother had not claimed there was any error at the dispositional hearing, but asks this court instead to "review all the facts underlying the referral order to render proper relief on appeal." The reviewing court is not required to review

² The minute order indicates the parents were advised of the need for writ review, but the reporter's transcript shows they were instead advised of the right to appeal.

independently the record when a juvenile court order affects a parent's right to custody. (*In re Sade C.* (1996) 13 Cal.4th 952, 981-993; *In re Sara H.* (1997) 52 Cal.App.4th 198, 200-202.)

III. The Beneficial Relationship Exception to Adoption

The parents contend the court prejudicially erred in finding there is no beneficial parent-child relationship. Mother also argues the court misapplied the law in making its decision.

Adoption is the permanent plan favored by the Legislature. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If a child is found to be adoptable it becomes the parents' burden to show termination of parental rights would be detrimental because one of four specified exceptions listed in section 366.26, subdivision (c)(1) exists. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 574.) Under the exception in section 366.26, subdivision (c)(1)(A), the parent must show termination would be detrimental in that "[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

In reviewing whether sufficient evidence supports the trial court's finding the exception is not present the appellate court reviews the evidence in the light most favorable to the court's order, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 576.)

The court did not err in finding the parents did not demonstrate the exception of section 366.26, subdivision (c)(1)(A). Here, although they visited the children each

week, neither parent could show he or she had established a parent-child relationship with Angel or Larry that would outweigh the benefits of adoption. The social worker testified she had observed about 20 visits between the parents and Angel and about 10 to 12 of their visits with Larry, and, in her opinion, their relationships with the children were merely that of friendly visitors. The bonding study indicated Angel and Mother did not have a significant, primary relationship and that Angel saw Mother as she would see a familiar person who came into her life each week. The parents did not show a relationship that would outweigh the benefits the children would gain from the stability of adoption. Substantial evidence supports the court's determination that the beneficial relationship exception did not apply.

Mother asserts the court misapplied the law by considering the risks the children would face in the parental home. The court did not err in mentioning the potential risk the children faced from the parents. It was an appropriate part of its consideration in determining that the benefits and stability of an adoptive home would outweigh any benefit they would gain from continuing the parent-child relationships.

DISPOSITION

The judgments are affirmed.

HUFFMAN, J.

WE CONCUR:

KREMER, P. J.

McDONALD, J.